



Land and Environment Court
New South Wales

Case Name: Potter v Woollahra Municipal Council

Medium Neutral Citation: [2023] NSWLEC 1757

Hearing Date(s): Conciliation conference on 30 November 2023

Date of Orders: 12 December 2023

Decision Date: 12 December 2023

Jurisdiction: Class 1

Before: Walsh C

Decision: The Court orders that:
(1) The appeal is upheld.
(2) Development Application No 602/2021/1, as amended, for the construction of a second dwelling on the lower part of 26-28 Wolseley Road, Point Piper (in the form of an attached dual occupancy with connectivity via the existing dwelling), landscaping, drainage and other associated works, is determined by the grant of consent, subject to conditions contained in Annexure A.

Catchwords: DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 8.7, 8.15
Environmental Planning and Assessment Regulation 2021, s 38
Land and Environment Court Act 1979, ss 34, 34AA
State Environmental Planning Policy (Biodiversity and Conservation) 2021, ss 6.65, 10.10, 10.53, Pt 10.3, Div 2
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
Woollahra Local Environmental Plan 2014, cll 1.8A, 2.7,

4.1A, 4.3, 4.4, 5.10, 6.1, 6.2, 6.4, Sch 5

Texts Cited: Sydney Harbour Foreshores and Waterways Area Development Control Plan 2005

Category: Principal judgment

Parties: Collette Potter (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
P Tomasetti SC (Applicant)
S Simington (Solicitor) (Respondent)

Solicitors:
Dentons Australia (Applicant)
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2023/175562

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** These proceedings, brought under Class 1 of the Court's jurisdiction, are an appeal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the decision of Woollahra Local Planning Panel to refuse Development Application No DA 602/2021/1 (DA). The respondent in the proceedings is the Council of the Municipality of Woollahra (Council) by virtue of s 8.15(4) of the EPA Act.
- 2 The DA seeks consent for the construction of a second dwelling (as a dual occupancy) and associated development on the lower part of 26-28 Wolseley Road, Point Piper, legally described as Lot 1 in DP 68485 (site). Briefly here, this second dwelling would be built on five levels as the site drops quite steeply from east to west towards the western site boundary which adjoins Sydney Harbour. A new excavated pedestrian tunnel underneath the existing dwelling would connect the existing and proposed dwellings.

Conciliation brings agreement based on amending plans and documentation

- 3 The Court arranged a conciliation conference between the parties under s 34AA of the *Land and Environment Court Act 1979* (LEC Act), which was held

on 30 November 2023, and at which I presided. I can note here that the proceedings commenced with a site inspection, at which I had the opportunity to hear from a number of objectors and to view the site from the premises of one of these objectors.

- 4 In the course of conciliation, the parties came to a point where they were able to advise me they had reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. This decision involved the Court upholding the appeal and granting development consent to the DA, as amended, subject to conditions. Soon after the parties provided the Court with a signed agreement pursuant to s 34(3) of the LEC Act.
- 5 With respect to amendments to the DA, I note the advice of the parties that there were significant changes to the built form and landscaping particulars and a minor reduction in the excavation requirements. The built form changes included a reconfiguration of windows to the northern boundary and some reconfiguration of setbacks and planting to the southern boundary. A significant landscape change involved the provision of an advanced fig tree on a deep soil area up from the foreshore boundary. These changes were seen to address neighbour amenity and landscape character (including foreshore character) considerations.
- 6 The Court notes that Council has agreed, pursuant to s 38(1) of the Environmental Planning and Assessment Regulation 2021, to the applicant's amendment of the DA to rely on the amended plans and documents as follows:

Item	Document
1.	<p>Architectural Plans by EmBeCe dated 8 November 2023</p> <ul style="list-style-type: none">• Cover sheet, Drawing no. DA000, Revision G• Notification Plan, Drawing no. DA002, Revision D• Notification East & West Elevation, Drawing no. DA003, Revision D• Notification South Elevation, Drawing no. DA004, Revision D

- Notification North Elevation, Drawing no. DA005, Revision D
- Schedules, Drawing no. DA008, Revision D
- Site Analysis, Drawing no. DA009, Revision G
- Site Plan – Existing, Drawing no. DA011, Revision G
- Site Plan – Proposed, Drawing no. DA012, Revision G
- House 02 – Level 01 Plan, Drawing no. DA111, Revision I
- House 02 – Level 02 Plan, Drawing no. DA112, Revision I
- House 02 – Level 03 Plan, Drawing no. DA113, Revision I
- House 02 – Level 04 Plan, Drawing no. DA114, Revision K
- House 02 – Level 05 Plan, Drawing no. DA115, Revision K
- House 01 – Level 01 Plan, Drawing no. DA116, Revision K
- House 01 – Level 02 Plan, Drawing no. DA117, Revision J
- House 01 – Level 03 Plan, Drawing no. DA118, Revision J
- Roof Plan, Drawing no. DA119, Revision J
- House 02 – Level 01 Demolition, Drawing no. DA125, Revision B
- House 01 – Level 01 Demolition, Drawing no. DA126, Revision F
- House 01 – Level 02 Demolition, Drawing no. DA127, Revision F
- House 01 – Level 03 Demolition, Drawing no. DA128, Revision F
- Elevation – East, Drawing no. DA201, Revision G
- Elevation – South, Drawing no. DA202, Revision G
- Elevation – West, Drawing no. DA203, Revision G

	<ul style="list-style-type: none"> • Elevation – North, Drawing no. DA204, Revision G • Section 01, Drawing no. DA301, Revision I • Section 02, Drawing no. DA302, Revision G • Section 03, Drawing no. DA303, Revision G • Section 04 & 05, Drawing no. DA304, Revision E • Shadow Diagrams – 21 June, Drawing no. DA811, Revision D • Floorplate Diagrams – Existing, Drawing no. DA821, Revision F • Floorplate Diagrams – Proposed, Drawing no. DA822, Revision G • Floorplate Diagrams – Proposed, Drawing no. DA823, Revision F • Floorplate Diagrams – Proposed, Drawing no. DA824, Revision F • Envelope Diagrams, Drawing no. DA831, Revision D • Excavation Diagrams, Drawing no. DA861, Revision G • Excavation Diagrams, Drawing no. DA862, Revision G • Landscape Diagrams, Drawing no. DA871, Revision F • Landscape Diagrams, Drawing no. DA872, Revision F
2.	Architect's Schedule of Design Changes made to the DA Plans as contained in the Amended Architectural Plans by Em Be Ce
3.	Amended Landscape Plans including Landscape Mark Up Sketch by Dangar Barin Smith dated 9 November 2023, Revision H
4.	Amended BASIX Certification dated 30 November 2023 and Stamped Plans
5.	Amended Hydraulic Plans by ITM Design dated 3 November

	2023, Revision A
6.	Amended Visual Impact Assessment by Urbaine Design Group, dated November 2023
7.	Amended Construction Management Plan by Athan Giannikos dated 3 November 2023, Revision B
8.	Geotechnical statement prepared by JK Geotechnics dated 15 November 2023
9.	NATHERS Certificate No. 0009038167-04, dated 30 November 2023

- 7 Relevantly, the amending documentation has been filed with the Court on 28 November 2023 (as an attachment to an affidavit sworn by S Vatala and filed with the Court on the same date).

Jurisdictional considerations

- 8 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' agreed decision, provided it is a decision that the Court could have made in the proper exercise of its functions.
- 9 There are certain jurisdictional pre-requisites which require attention before the function of upholding the appeal can be exercised. The parties' jurisdictional statement provided to the Court on 30 November 2023 has been of assistance here. Regarding jurisdiction, and noting this advice from the parties, I am satisfied in regard to the matters listed below.

Woollahra Local Environmental Plan 2014

- 10 The site is zoned R3 Medium Density Residential under Woollahra Local Environmental Plan 2014 (WLEP) and there is no dispute the proposal is permissible in the zone with consent. I have considered the zone objectives. Demolition is permissible under cl 2.7.
- 11 The parties advise that the proposed development would not contravene any WLEP development standards. This includes the particular provisions relating

to minimum lot size and building height at cl 4.1A and 4.3(2A) respectively. I accept the advice that the provisions of now repealed cl 4.4(2A) continue to apply to the proposal as a consequence of savings provisions at cl 1.8A(2). In turn, there is no applicable floor space ratio control applying to this proposal under WLEP.

- 12 The existing dwelling located at the eastern, upper end of the site is identified as a local heritage under Sch 5 of WLEP. The heritage listing is for "building and interiors". Accordingly, cl 5.10(4) requires the consent authority to consider the effect of the proposed development on the heritage significance of the existing heritage item. I note that consideration has been given to the effect of the proposed development on the heritage significance of both the item and other nearby items; and further, that consideration of Aboriginal heritage significance has also occurred (Development Application Assessment Report to Woollahra Local Planning Panel dated 4 May 2023 (Assessment Report) pp 32-36). The jurisdictional requirement, under cl 5.10(4), for "(consideration) of effect" has been met.
- 13 Consideration has been given to cl 6.1, relating to acid sulfate soils (Statement of Environmental Effects, Class 1 Application filed 1 June 2023, Tab 4 p 28). The provisions are not triggered in this instance because the site is Class 5 land and works are not proposed within 500m of any Class 1-4 land.
- 14 Consideration has also been given to cl 6.2, relating to earthworks. Here I note that a report by JK Geotechnics dated 15 November 2023 responds directly to the considerations at cl 6.2(3). Council has also advised me of its attention to the requirements for management of excavation spoil and requirements for revision to the Construction Management Plan.
- 15 Clause 6.4 of WLEP is concerned with "limited development on foreshore area". Some works are proposed in the defined "foreshore area 12" (ie within 12m landside of the mean high water mark (MHW)). These works essentially involve retaining wall and stair replacement and reconfiguration, and new deep soil area with grass and canopy tree planting improvements. I accept the advice of the parties that these works are for purposes in accordance with the permissible development provisions of cl 6.4(2). I have considered the matters

nominated at cl 6.4(5) and I also accept the advice provided to me by the planning expert appearing for the Council (Mr S McMahon as provided in Council's email to Land and Environment Court Commissioner Support dated 1 December 2023) that relevant requirements of cl 6.4(4) have been met. In turn I am satisfied that:

- (1) Mindful of cl 6.4(4)(a): the development within foreshore area 12 will contribute to achieving the zone objectives, as relevant. This is because, relevantly, the proposed work within the foreshore: (1) provides for passive recreational use to meet needs or aspirations associated with the accommodation available on the larger site, (2) is modest in scale and height and in-character with the surrounds, and (3) as far as the foreshore area development is concerned, it provides for enhancement to the tree canopy in foreshore area 12 itself (by provision of an advanced (minimum 400L pot size) *Ficus rubiginosa* or Port Jackson fig noted in the parties' proposed Condition E27).
- (2) Mindful of cl 6.4(4)(b): the appearance of proposed structures both from the waterway and adjacent foreshore areas will be compatible with the surrounding areas. This is again because of its scale and character and the proposed landscape improvements within foreshore area 12.
- (3) Mindful of cl 6.4(4)(c): the development within foreshore area 12 will not cause environmental harm such as the kind cited at cl 6.4(4)(c). This is because of its type and its location above MHW and the fact that it is not sited within marine habitat, or on significant drainage land, flora or fauna habitat or wetland.
- (4) Mindful of cl 6.4(4)(d): the location of the proposed works within foreshore area 12 constitutes private land and could not be reasonably expected to cause congestion or generate conflict between people using open space areas or the waterway.
- (5) Mindful of cl 6.4(4)(e): opportunities to provide continuous public access along the foreshore and to the waterway would not be compromised given the type of works proposed in foreshore area 12 (ie a flat trafficable lawn with stair access to the waterway).
- (6) Mindful of cl 6.4(4)(f): as relevant, the proposed works within foreshore area 12 itself would be reasonably seen as maintaining and improving the aesthetic significance of this foreshore land and maintain that of surrounding land given the proposed landscaping improvements in this foreshore area.
- (7) Mindful of cl 6.4(4)(g): given their scale and form, the alterations to the proposed stairs and landscaping would not be reasonably seen as having an adverse impact on the amenity or aesthetic appearance of the foreshore.

16 These findings mean the provisions of cl 6.4 do not provide a jurisdictional bar to the grant of consent for the works within foreshore area 12.

- 17 In turn I find there are no jurisdictional impediments to the grant of consent for the overall DA relating to WLEP.

State Environmental Planning Policy (Resilience and Hazards) 2021

- 18 I accept the advice of the parties that the site has previously been used for residential purposes and that there is little likelihood at all of contamination. The requirements of s 4.6(1) of the State Environmental Planning Policy (Resilience and Hazards) 2021 are satisfied.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

- 19 The parties advise that now repealed Ch 10 (Sydney Harbour Catchment) continues to apply by virtue of savings and transitional provisions (at cl 6.65).
- 20 The parties advise that savings provisions at cl 6.65 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 provide that the DA should be assessed against the now repealed "Chapter 10 Sydney Harbour Catchment". Relevantly, Pt 10.3 Div 2 identifies matters for consideration before granting consent. The relevant matters have been subject to the required consideration as evidenced from the commentary in the Assessment Report (pp 21-25). There are also relevant considerations in relation to the protection of heritage items at cl 10.53. Again due consideration is evident from the Assessment Report (p 25). Consideration has also been given to the Sydney Harbour Foreshores and Waterways Area Development Control Plan (Assessment Report p 25-28).

Other considerations

- 21 I note the advice of Council that the development application was notified in accordance with requirements and that objecting submissions were received. I also had the opportunity to hear from a number of objectors during the site inspection and inspect from the premises of one of the objectors. With the hearing of oral submissions and review of written submissions provided in Council's bundle of documents filed on 24 November 2023, I believe I have an understanding of the objecting submissions. The parties have advised me, generally, how objecting submissions have been "taken into consideration", which is the requirement of s 4.15(1)(d) of the EPA Act.

Conclusion

- 22 With the above findings, I am satisfied that the jurisdictional pre-requisites have been met and the parties' decision is one that the Court could have made in the proper exercise of its functions. In turn, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.
- 23 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any merit assessment of the issues that were originally in dispute between the parties. The LEC Act also required me to "set out in writing the terms of the decision" (s 34(3)(b)). The final orders have this effect.

Orders

- 24 The Court orders that:
- (1) The appeal is upheld.
 - (2) Development Application No 602/2021/1, as amended, for the construction of a second dwelling on the lower part of 26-28 Wolseley Road, Point Piper (in the form of an attached dual occupancy with connectivity via the existing dwelling), landscaping, drainage and other associated works, is determined by the grant of consent, subject to conditions contained in Annexure A.

P Walsh

Commissioner of the Court

175562.23 Annexure A

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